In the

Supreme Court of the United States

October Term, 1979

79-879

IN THE MATTER OF
RICHARD T. TRACY, SR.,
Judge of the City Court,
Phoenix, Arizona,

Petitioner,

AGAINST

RODGER A. GOLSTON, JOHN WENTZ, ANTHONY H. MASON, ROBERT C. BROOMFIELD, STANFORD LERCH, JAMES CAMERON, JAMES O. WHITE, CHARLES LEE WHITECRAFT, ROBERT J. DONOHOE, MARGARET P. HANCE, WILLIAM DONAHUE, JOY W. CARTER, ROSENDO GUTIERREZ, KENNETH O'DELL,

Respondents.

PETITION FOR WRIT OF CERTIORARI [redacted]
[redacted]T TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner demands that Writ of Certiorari be issued to the United States Court of Appeals for the Ninth Circuit to review judgment affirming the District Court which dismissed federal claims and allowed the Chief Justice of the Arizona Supreme Court, a defendant in this Federal Suit, to transfer a state appeal to the Arizona Supreme Court for disposition. The U.S. Court of Appeals now cites that state judgment as controlling upon questions presented in this action. Both the State and Federal Courts have in this case

assumed positions of ecclesiastical courts, in contrast to court of law. Petitioner's entitlement to due process and equal protection of the law should not be a matter of grace, dispensed at the pleasure of Associates of the Respondents, James Duke Cameron, who was acting in a non-judicial role at the time complained of in this suit.

The United States Court of Appeals for the Ninth Circuit has sanctioned gross departure from applicable decisions of this Court, the Constitution and Statutes and from accepted and unusual course of judicial proceedings so as to call for an exercise of this Court's power of supervision. Supreme Court Rule 19(b). *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973).

Petitioner did not receive a fair hearing in any tribunal, judgments are based on overruled oppressive doctrine and unorthodox procedures. Respondents advanced sham defenses such as citing *Paul v. Davis*, 424 U.S. 693, and this Court's requirement of a "tangible interest, such as employment," required to demonstrate liberty or property interest, knowing Petitioner was dismissed from his employment as City Judge and prevented from engaging in his profession for three years as a result of the conspiring complained of herein. In the State case, they argued that an "ordinance is not a law." That star chamber proceedings by an official body created by law, was merely a group of "civil minded individuals," the same definition could apply to a lynch mob, the facts will reveal procedures employed would be appropriate for the latter, not an official body composed of judges, lawyers and learned laymen.

OPINIONS BELOW

This Court has previously denied Certiorari before Judgment in Case 77-348 and upon the State Appeal in October 1978, Case 78-513. The merits were not reviewed in Respondents' Motion to Deny Certiorari in those attempts to obtain justice in this Court.

The Memorandum Opinion of the Ninth Circuit of the United States Court of Appeals is unreported, it is reproduced as Appendix A.

The pronouncement of judgment in which the Senior Judge dismissed the Federal Claims and directed Petitioner to exhaust already dismissed state administrative remedies, is reproduced as Appendix B.

The Judgment of the Arizona Supreme Court, in an action which sought to review and void by Special Action (Writ of Certiorari) Quo Warranto and violation of Open Meeting Law, is reported as *Tracy v. Dixon*, 119 Ariz. 165, 579 P.2d 1388 (1978) and reproduced as Appendix C.

The order denying the timely Motion for Rehearing by the Ninth Circuit Court of Appeals on September 12, 1979 is reproduced as Appendix D.

JURISDICTION

This Court's jurisdiction is found in 28 U.S.C. 1254(1), 28 U.S.C. 1257(3), 28 U.S.C. 1651 and 42 U.S.C. 1984. This petition for certiorari is filed within 90 days after denial of timely motion for rehearing by the Ninth Circuit Court of Appeals in banc.

STATEMENT AS TO JURISDICTION

In enacting 42 U.S.C. 1984, Congress intended this Court review civil rights cases and assure that constitutional safeguards were observed by the states. For nearly a century, that mandated check and balance was ignored. Now, again, guided by recent decisions and pronouncements of this Court, local judiciary are free to consider citizen's rights a matter of judicial discretion. In the case at hand, the Arizona Supreme Court based its decision on pre-*Monroe v. Pape*, 365 U.S. 167, overruled cases and denied relief specifically provided Petitioner while ignoring Respondents violations of Statutes and Constitutions. The U.S. Court of Appeals, after sanctioning absention by the Federal District Court and disregarding Petitioner's plea that he was being subjected to discrimination by the State Judiciary and "subject to the law of the jungle," sets out in its Opinion that the trial court retained jurisdiction of liberty interest when that court had dismissed all defendants in their individual capacity, no civil rights claim remains upon which relief can be granted. While stating that "it is unlikely that the Plaintiff would have been able to show a property interest or entitlement sufficient for stating a constitutional claim," referring to a *Roth* or *Sinderman* pre-termination hearing. It disregards the illusion of such hearing having been held. Petitioner was not permitted to attend either the public or secret hearing. Afforded no right of confrontation as mandated in *Green v. McElroy*, 306 U.S. 474 (1959) and *Schware v. Board of Education*, 397 U.S. 232.

Current lack of Rule of Law in this nation is the basis of the general crisis of confidence in government and its institutions. Once again, selective application and enforcement of laws reminicent of the lawlessness of the roaring

twenties which produced the depression of the thirties is found at all levels of government. The Constitution of the United States provides that responsibility for proper use of judicial power rests in this Supreme Court. Petitioner need not quote the dissenting opinions issued by Justices of this Court during the past decade concerning the Federal Courts abandoning "their position as the primary and powerful reliance for vindicating every right given by the Constitution the laws and treaties of the United States." *Younger v. Harris*, 401 U.S. 37, 58, 65, dissent of Justice Douglas or as found in *Hauffman v. Pursue Ltd.*, 420 U.S. 592, 613-618 (1975), *Juidice v. Vail, Jr.*, 429 U.S. 893 (1977). This Petitioner was also stripped of a forum and remedies that Federal Statutes as well as State Statutes were enacted to assure him. During the past decade under the guise that courts are too crowded to administrate justice, protest, violence and terriorism appear the only effective avenue for relief of grievances by group action. No relief is available to the individual injured by governmental action unless it pleases some court to grant relief.

QUESTIONS PRESENTED

1. Is a member of the judiciary, who follows the mandate of the Judicial Code and oath of office and discreetly offers constructive criticism of an unfair and inefficient justice system, entitled to the Protection of the First, Fifth and Fourteenth Amendments of the United States Constitution?

2. Is an Attorney-Judge deprived of liberty and property when a board, composed of the highest ranking state judicial officer, other judges and lawyers, improperly intervene and prevent his reappointment to office and in so doing, issue false charges which damages his standing with his

employer as well as injures his reputation in the profession and courts where he must practice his trade as an attorney?

3. Has a superior judicial officer a right to prevent an incumbent from being considered by an appointing body without legal process by assuming the legislative function?

4. Has a District Court jurisdiction to dismiss Federal Claims filed under 42 U.S.C. 1981 to 1986 inclusive and 42 U.S.C. 1988, knowing that state administrative remedies have already been denied by the state's highest court and due to lack of an impartial state judicial forum there in no opportunity to fairly pursue his federal claims.

5. Was the District Court required to observe the Federal Rules of Procedure and deny Respondent's Motion for Summary Judgment when it was supported only by hearsay argument of counsel?

6. Did the Senior Judge err by retaining, in the action, a possible right to a *Regents v. Roth* hearing, yet dismiss any possible claim that would compensate Petitioner for liable and slander, loss of income or legal expenses and other relief which accompanies such right?

7. Whether the District Court abused its discretion and exceeded its jurisdiction in disregarding the challenge to the array of jurists under 28 U.S.C. 455 by assigning the hearings on Motion for Summary Judgment to a retired Judge rather than grant or deny the motion and allow an opportunity for the filing of an Affidavit under 28 U.S.C. 144, for Bias and Prejudice?

8. Was there an abuse of discretion by the District Court in granting Summary Judgment denying federal claims, requiring Petitioner to exhaust inadequate state remedies,

ignoring allegations of conspiracy, supported by evidence that Petitioner's non-retention was in retaliation for his exercise of First Amendment right of free speech?

THE FACTS AND CASES

1. Petitioner, an attorney since 1954 in Ohio and New York, relocated in Arizona for family health reasons and was appointed a Phoenix City Court Judge pro tem, then to a four year term on February 14, 1972. The court was in a state of chaos, unable to function, by example, persuasion, distribution of legal summaries, facts and figures, he assisted in reducing the backlog of pending cases, which reduced new cases, helped implement rules and policies that eliminated waste and unequal treatment, particularly practices which resulted in mass dismissals or reduction of charge (Appendix E).

REACTION TO IMPROVEMENT IN THE COURT

2. The controlling bi-partisan conservative group preferred the previous system of confusion and double standard. With twice the national average per capita of judges, most contested criminal cases were not being processed and civil matters clogged the court system. Petitioner's efforts to implement the 1960 Modern Court's Amendment, increase communications as a check and balance to assist in providing certainty in results of litigation, brought about a coalition dedicated to keeping Petitioner in the background and then seeing to it that he was not reappointed. This was manifested in many ways but most apparent, in the appointment and acts of Respondent Golston, a young wheeling dealing prosecutor with no judicial experience, who

assumed the City Chief Judge position and Administrator's duties and later became chairman and chief witness for the City Judicial Selection Board, formed 90 days before the expiration of Petitioner's fixed term.

THE SEPARATION OF POWERS OF PHOENIX CITY GOVERNMENT

3. The City Court a separate and independent branch of Phoenix City government by a Charter which provided that judges would be appointed by City Council. No provision made for removal by appointment of a successor or expiration of fixed term. City Charter, Chapter 8, § 3B.[N1] To be politically independent the judges had to have tenure and in fact none had been removed or replaced. All city employees were entitled to both a hearing and appeal.

The Judicial Selection Board took over City Council's duties as to judges, although its stated purpose was the selection of candidates to fill vacancies, as to incumbents, it was limited to "advise the Council regarding reappointment." Under City Ordinance § 8742, the Board was to hold meetings for the following purpose:

> "The board shall, whenever practical, hold public meetings designed to permit interested parties and groups to submit and recommend persons for consideration."

[N1] Chapter 8, Section 1

"There shall be a city Court system as a *separate* and *independent* branch of the government of the City of Phoenix. . ."

Chapter 8, Section 3(a)(b)

"(a) The judges of the City Court shall be appointed by the Council of the City of Phoenix . . . *All subsequent appointments shall be for four year terms,* a vacancy occurring before the expiration of a term shall be filled by appointment for the remainder of the term."

"(b) Judges of the City Court *may be removed* by the City Council *for cause* on motion adopted by the affirmative vote of two thirds of the members of the Council" (Emphasis supplied).

Instead it placed on trial incumbents, never opened candidates' meetings. The Board, on February 25, 1976, held an advertised public meeting and secret meetings, at which the Chairman, the City Prosecutor and Chief Public Defender were witnesses. The purpose was ro review the judicial performance of three incumbents, two of whom had requested but were not permitted to attend any meetings. The Board acted as though they dealt with vacancies in office, removed two of the incumbents, interviewed applicants and when Petitioner protested and requested a Council hearing, which had been offered, coerced the City Council into denying a hearing or de novo appeal. The prestigious Board "threatened to resign en masse if its recommendations weren't upheld."

NO VACANCY DUE TO EXPIRATION OF FIXED TERM

4. Sections 38-291 and 395(b) A.R.S. and a long line of cases prevented a vacancy from occurring until the appointing body had "regularly acted," *McCall v. Cull*, 51 Ariz. 237, 75 P.2d 696. While Administrative Law Rules and the Open Meeting Law granted a right to a de novo hearing and A.R.S. § 38-431.03.1, provided that upon "demand" by an "appointee or employee," "the discussion and consideration" of "employment or appointment" "occur at a public meeting"[N2] and A.R.S. § 38-431.05 provided:

[N2] Section 39-431.03 A.R.S.

"A. This article shall not be construed to prevent governing bodies, upon majority vote of the members constituting a quorum, from holding executive session for only the following purposes:

1. Discussion or consideration of employment, assignment, *appointment*, promotion, demotion, salaries, disciplining or resignation of a public officer, appointee or employee of any governing body, except that with the exception of salary discussion, an *officer, appointee or employee may demand that such discussion or consideration occur at a public meeting.*" (Emphasis supplied).

"All business transacted in any body during a meeting or public proceedings held in violation of the provisions of this article shall be null and void."

After demand upon both Board and Council, such bodies did meet secretly, voted to remove and replace Petitioner without notice or open meeting. It was then that extensive press and T.V. coverage with charges against Petitioner commenced, inferring he was a "racist", "unfair to poor", etc., all intended to lose him Council and public support. Plaintiff appeared at City Council's weekly meeting on March 9, 1976 and requested a due process hearing, at which time his successor was appointed to a partial term and he, effective April 5, 1976, was to vacate his office.

PROCEEDINGS IN STATE COURT

5. After demand and refusal to prosecute by the Attorney General and County Attorney, Petitioner, on May 25, 1976, filed a Class Action form Petition under the following provisions:

(1) Quo Warranto, A.R.S. § 12-2043

(2) Violation of Arizona Open Meetings Laws A.R.S. § 38.431.07.

(3) Administrative Special Actions A.R.S. 17 and A.R.S. § 12-2001 (Review by Certiorari)

In an effort to void the aforesaid proceedings, mitigate damages, restore status quo and establish tenure for all incumbent City Court Judges, Maricopa Count, Arizona, Superior Court Case No. C-333371.

The Superior Court Judge on June 22, 1976, limited hearing to a sham Motion to Dismiss. In granting Summary Judgment for Defendant, City of Phoenix based on nonexistent

"absolute power" of Council and because the Judicial Selection Board allegedly conformed to State Constitution's provision of "Merit Selection", which does not apply to City Court Judges, the Superior Court Judge kept referring to the Chief Justice of the Arizona Supreme Court being present on the Board. The Court refused to allow witnesses to be called, defendants presented no verified pleadings, only Petitioner's evidence offered as exhibits in defense of a motion for Summary Judgment was before the Court. Rule 56(c), A.R.S. 16, Rules of Civil Practice. The Judgment and Findings were deliberately worded to prevent Appellant from vindicating his federal civil rights or being compensated in any future action against the officials as individuals.

The Arizona Supreme Court affirmed the Superior Court by denying review in Case 12760 July 20, 1976 and dismissing the State appeal in Case 13195 on July 27th 1978. Appendix C.

An opinion inconsistent with recent holdings in *Application of Levine*, 97 Ariz. 88, 397 P.2d 205; *Johnson v. Collins*, 11 Ariz. App. 327, 464 P.2d 647 and *Vazzano v. Superior Court*, 106 Ariz. 542, 479 P.2d 685. The Proceedings removing Petitioner were void and a nullity. The Petition for Certiorari to this Court in Case 77-348 dismissed without Respondents' being required to address the merits since it was unavoidable, filed one day late.

PROCEEDINGS IN THE DISTRICT COURT ON FEDERAL CLAIMS

6. On February 16, 1977, Petitioner duly commenced in the Federal District Court for Arizona, citing 28 U.S.C. 1331 and 1343, 42 U.S.C. 1981-1986 inclusive and 1988,

three Civil Rights actions in one complaint seeking damages and injunctive relief against fifteen individuals who, under color of state law as City of Phoenix officials, deprived Petitioner of Constitutional rights and immunities, his professional position and reputation as both an attorney and City Judge. Case No. CIV 77-121 was assigned to Chief District Court Judge the Honorable Walter E. Craig.

THE FEDERAL CLAIMS

7. The Complaint charged certain individual Defendants, acting in their official capacity, of engaging in a conspiracy to deprive Petitioner of his office as a member of a separate and independent branch of City government. That some Defendants also occupied other official positions, as the Chief Justice of the Arizona Supreme Court, the Chief Superior Court Judge, State Bar Association Treasurer and President of Plaintiff's County Bar Association and misused the prestige of their other office to dignify unfair and unlawful proceedings. That other Defendants were aware of the civil rights violations and assisted or failed to prevent the complained of acts.

The Complaint sought injunctive relief to prevent the Respondents from maintaining or releasing any record of the actions taken against Petitioner; a declaratory judgment voiding the proceedings and legislation; reinstatement in office subject to hearing in accord with due process by the City Council; exemplary and compensatory damages, and protection from further acts by Respondents or others in their behalf to further deprive Petitioner of due process or equal protection of law.

MOTION UNDER 28 U.S.C. 455 AVOIDED

8. The District Court Judge, Walter E. Craig, did not request reassignment of the case to a District Court Judge not a member of the Arizona Bar Association as he customarily did in matters involving officers of the Bar Association or Arizona Supreme Court. The Petitioner, after a sham Motion to Dismiss or Abstain was filed by Respondents, filed a Challenge to the Array of Jurists citing custom and provisions of 28 U.S.C. 455 and that he had a reasonable question concerning the ability of an Arizona Judge to be impartial. Petitioner then filed a Motion for Partial Summary Judgment requesting the equity relief usually afforded under *Regents v. Roth*, 408 U.S. 59; *Perry v. Sinderman*, 408 U.S. 593 and *Pickering v. Board of Education*, 391 U.S. 563 and attached exhibits illustrating his efforts through exercise of First Amendment rights to improve the local justice system in which he was employed as well as his affidavit and other evidence contraverting defenses raised and supportive of his Motion. Petitioner had with the complaint submitted several news articles and three editorials, some quoting the Respondent Golston, Chairman of the Judicial Selection Board, stating false charges allegedly levied against Appellant at secret meetings of the Board.

The District Court Judge assigned both Motions to a visiting Senior Judge, the Honorable Martin Pence of Hawaii, for disposition during his temporary assignment to Arizona from April 4 to April 23, 1977 without ruling on the Motion filed under 28 U.S.C. 455 and making it impossible to file an affidavit of bias and prejudice under the circumstances. Petitioner, an attorney for over twenty years,

although not experienced in Federal or Civil Rights matters, was then put on notice that, after a year of harassment in State Court, he was to be denied justice in the Federal Court. Motions to dismiss are disfavored. If pleadings are defective, the right to amend is usually granted and such motions can require several hearings. Rule 8F, Federal Rules of Procedures provides, "All pleadings shall be so construed as to do substantial justice." *Azar v. Conley*, 456 F.2d 1382 (6th Cir. 1972); *Wood v. Maryland Casualty*, 322 F. Supp. 295 (D.C. La. 1971); *Boles v. Fox*, 403 F. Supp. 253; *U.S. v. Diebold*, 369 U.S. 654; *Haines v. Kerner*, 404 U.S. 519 (1972); *Boline v. United Farm Workers*, 494 F.2d 541 (9th Cir. 1974); *Lownschuss v. Kane*, 520 U.S. 55 (2d Cir. 1975). This Court had laid down the following direction to Federal Courts in *Arlington Heights v. Metro Housing Corp*, 429 U.S. 252, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977).

> "Determining whether invidious discriminating purpose was a motivating factor demands a sensitive inquiry into circumstantial and direct evidence."

The Petitioner had alleged in his Complaint, Motion for Partial Summary Judgment and evidence that was uncontraverted, such actions of the state officials was in retaliation of exercise of First Amendment Rights. *Pickering v. Board of Education, supra*; *Rafferty v. Philadelphia Psychiatric Center*, 356 F. Supp. 500 (1973); *Dombrowski v. Pfister*, 380 U.S. 479 (1965), where the United States Supreme Court created an express exception to the abstention doctrine for cases involving the right of free expression. Prior to the hearing, in *Mt. Healthy v. Doyle*, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568, this Court held evidence of retaliation for exercise of First Amendment

rights shifted the burden onto the agency to "show by a preponderance of the evidence that it would have reached such a decision as to re-employment even in the absence of the protected conduct."

Petitioner was, by the actions of the District Court Judge, placed in the same type of position he was in when the Chief Justice of the Arizona Supreme Court sat upon a board allegedly hearing evidence regarding his judicial performance and as in the state case, the District Court Judge and Senior Judge acted arbitrarily, capriciously and departed from the normal, accepted and usual course of judicial proceedings. They resolved and decided federal questions in a way which conflicted with decisions of the Supreme Court and as in the state case signed a Judgment inconsistent with the Pronouncement of Judgment so as to award Summary Judgment on the merits which Petitioner was prevented from presenting, many clearly jury questions. Protection of the Federal Courts as outlined in *England v. Louisiana*, 375 U.S. 411, 416 (1964), was not to be available although the possible remedy was inadequate.

The Senior Judge made the following ruling after denying Petitioner's motion for Partial Summary Judgment:

> "The Court: In effect, I am abstaining from everything except just this one, narrow claim, that's all. I am not abstaining: I am not using the England case. No, I am not abstaining. I am just simply ruling that he has no cause of action. He stated no cause of action to allow him—this is your motion to dismiss—not on the basis of everything that's over in the state, not on the basis of abstention; although if you want me to, I"ll put that as a double barrel, even if I am wrong on the first dismissal, I will also state that I would abstain from everything else. You can put that in. If I am wrong

in dismissing the actions other than just this one, narrow issue—one, narrow facet of the complaint—I would abstain from any of the rest because it appears to me from the pleadings and what has been represented here that all of the actions can be properly, and should properly be heard over on the state side and in the state courts where they now are resting.

"Prepare the order."

SENIOR JUDGE DISREGARDED THE EVIDENCE AND THE LAW

9. While Petitioner's Motion for Partial Summary Judgment was well supported with uncontraverted evidence and briefed recent federal court holdings, Respondents submitted no evidence, no verified pleadings, no witnesses, supported only by cases overruled by the Supreme Court in *Monroe v. Pape*, 365 U.S. 167, when it charged the traditional allocation of responsibilities between the State and Federal Courts. In the face of numerous citations on government employment rights and current law which does not require exhaustion of state remedies, *McNeese v. Board of Education*, 373 U.S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622 (1963) and *Steffel v. Thompson*, 415 U.S. at 472, 94 S. Ct. at 1222, 39 L. Ed. 2d at 522, where this Court said:

> "When federal claims are premised on 42 U.S.C. Sect. 1983 and 28 U.S.C. Sect. 1343 (3) - as they are here - we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights."

The City ordinance and procedures were flagrantly and patently unconstitutional, the removal motivated by desire to silence a dissident, certainly not the circumstances

which the U.S. Supreme Court referred to in *Joseph Juidice v. Harry Vail, Jr.*, 429 U.S. 893 (1977), but the result was that predicted by Justices Brennan, Marsall and Stevens in their dissenting or concurring opinions in the *Vail* case.

THEN THE STATE CASE WAS TRANSFERRED

10. The following day, on April 8, 1977, the state appeal, as one of the 144 transfers from 2337 cases processed or pending in the Arizona Court of Appeals during the year, was transferred on order of Chief Justice Cameron, to the Arizona Supreme Court. Assigned Case No. 13195, the Chief Justice again disqualified himself.

That State Appeal has been decided, *Tracy v. Dixon*, appendix "C", and is now cited by U.S. Court of Appeals for the 9th Circuit to support its decision stating that it is controlled by the law of the state, citing *Bishop v. Wood*, 426 U.S. 341 (1976). In *Bishop*, although the U.S. Supreme Court appeared to condone the fraud and deceit used to remove Bishop, an overzealous police officer, no constitutionally protected conduct or due process violation was present; thus, that was a local matter. In the instant case, Appellant's removal was in retaliation for exercise of protected conduct and numerous federal or state constitutional and statutory safeguards either denied or violated, not a local problem, but clearly one requiring federal intervention.

No Court takes cognizance that a re-employment hearing was in fact held on February 25th, 1976, both public and private but absent established constitutional safeguards and that alone entitled Petitioner to be reinstated.

As stated in *Greene v. McElroy*, 360 U.S. 474 (1959),

> "Certain principles have remained relatively immutable in our jurisprudence. One is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . ."

See also *Greene v. Kelly*, 397 U.S. 254, holding that a person may not be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted and cross-examined. *Schware v. Board of Bar Examiners*, 353 U.S. 232.

Appellant's case does not fail even if there be a lack of entitlement under *Perry* or *Roth*. Evidence of retaliatory action for exercise of First Amendment rights is present in this case as was present in *Haimowitz v. University of Nevada*, 579 F.2d 526 (9th Cir. 1978); *Pickering v. Board of Education*. Is the doctrine of *Mt. Healthy City Board of Ed. v. Doyle, supra*, unavailable to one who speaks out against poor court management or dictitorial powers being asserted by the judiciary intent on empire building. Free speech as established by the drafters of the Constitution gave right to open debate of all branches of government.

REASON FOR GRANTING THE WRIT

11. Petitioner, has been deprived of Constitutional rights and immunites under First, Fifth and Fourteenth Amendments by various members of the judiciary attempting to protect Respondent members of the judiciary. Such Respondents acted in their individual capacity, in violation of specific provision of the Constitution, and the Code of Judicial Conduct.

On June 20, 1976, while this nation prepared to celebrate its bicentennial, ostracized and abandoned by the legal community for defying an autocratic Board and having requested a fair hearing, Petitioner filed a brief in the Superior Court, which in part read as follows:

> "On July 4, 1776, the Declaration of Independence was signed which provided in part:"
>
> "We hold these truths to be self-evidence, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."
>
> "History advises that many of the signers of both the Declaration of Independence and later the Constitution employed slaves, tenant farmers or workers that were thought of as no more than instruments of commerce. It was not until 1868, with the adoption of the 14th Amendment, commonly known as the due process clause, that the promise of *Life, Liberty,* and the *Pursuit of Happiness* held meaning for the common man or woman.
>
> "AMENDMENT XIV (Rights of Citizenship) United States Constitution:
>
> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"The Due Process Clause brought down from the Magna Charta is also found in Article 2, Section 4 of the Arizona Constitution; as the United States Supreme Court said in *Truax v. Corrigan*, 42 SCt 124, 257 U.S. 312-66 LEd 254:

"The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. *Hurtado v. California*, 110 U.S. 516, 535. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law' 'this is a government of laws and not of men,' 'no man is above the law' are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute and apply laws."

The message of the Declaration of Independence is not moot, when Constitutional safeguards are, as in this case cast aside, those charged with the responsibility of enforcing its provisions, must not find excuses to step aside and allow the abuse to continue. The century of delay in enforcing the 14th Amendment and accompanying abuses by States demonstrates the burden placed on this and all Courts. Gross discrimination was practiced on this Petitioner, not only under recent decisions cited in this application, but under cases as *Wong Yen Suing v. McGrath*, 339 U.S. 33, 70 S. Ct. 445, 95 L. Ed. 616, and *Yeck Wo v. Hopkins*, 188 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1885) where this Court said:

"For the every idea that one may be compelled to hold his life, or the means of living or any material right essential to the enjoyment of life at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

The use of confidential information which a board would not permit the candidate to see or respond to was condemned by this Court in *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S. Ct. 753, 1 L. Ed. 2d 796 when this Court held:

"A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment . . . . Regardless of how the States grant of permission to engage in the occupation is characterized."

INDEPENDENCE AND INTEGRITY OF THE JUDICIARY

12. Under our Constitutional form of government the judiciary has carefully avoided non-judicial assignments. The reason is summarized in *Hayburns Case*, 2 D.C. 11 409, 1 L. Ed. 436 (U.S. 1792). In *City of Phoenix v. Pensinger*, 73 Ariz. 420, 242 P.2d 546 (1952), the Arizona Supreme Court found unconstitutional a City Charter Amendment which called for judges of a Court of Record to select candidates for the office of City Magistrate, later, to be called City Judges, Arizona Constitution, Article 6, Section 25, Phoenix City Ordinance § 8742 calls for both Appellate and Superior Court Judges of Courts of Record to serve upon the same type board. The Chief Justice designated or assigned himself to serve at the removal proceedings of Petitioner and then stepped aside. The Chief Justice

selects Chief Superior Court Judges and is also the Chairman of the State Merit Selection System for candidates of Superior and Appellate Courts. The secrecy of that body's activities and procedures for removal of an incumbent judge are all set out in the Arizona Constitution. Article 6, Section 35 and Article 6.1.

SOVEREIGN POWER WAS PRESENT, THE ACCUSED WAS NOT

13. It can be seen that vast power over the destiny of a member of the bar or judiciary rested with Chief Justice Cameron, as he sat as a member of the City of Phoenix Judicial Selection Board. Authority over all judiciary in the County complete when he signed the oath of that office. The right of dissent by the four other lawyers who served on the board would be inhibited, as would the right to refuse to appear or testify in the case of the City Prosecutor and Chief Public Defender, both of whom were summoned to testify for twenty minutes at the "private meeting". The evidence also demonstrated the helpless position occupied by the City Council, City Attorney and Petitioner's attorney when a due process hearing was requested. The struggle for control of City Court continues, as recent as October 9, 1978, Respondent Chief Justice Cameron suggested the City Council delegate to his office power to appoint the Chief City Court Judge. Since Petitioner's removal, chaos and confusion returned and has been the subject of widespread publicity. Traffic and criminal statistics demonstrate that the Court fails to perform its function. A recent suicide of one judge and the illness of several others attests to the pressure and lack of basic fairness to court personnel. Judges who must pass on

the guilt or innocent of more persons in a month than other jurists do in a year are still subject to the type of reemployment proceedings that led to Petitioner's removal. Anyone displeased can complain and the judge is defenseless.

THE EVIDENCE AND STANDARD OF PROOF AS IMPROPER AS THE BODY AND PROCEDURES

14. Courts have universally adopted the pronouncement in *In re McLaughlin*, 153 Tex. 183, 165 S.W.2d 805, *appeal dismissed*, 343 U.S. 859, 75 S. Ct. 83, 99 L. Ed. 677, the Court held:

> "in so grave a matter as depriving a judge of his office, the appropriate standard of proof is clear and convincing evidence."

The Judicial Selection Board denied Petitioner his right to suceed to his office based on hearsay testimony of employees of the Respondent City Manager, concerning the "confidential view" of other employees. The Chairman, Respondent Golston, the chief witness, brought to the closed meeting evidence involving "one judge" and at a proceeding concerning impartiality of the City Judges due to the unorthodox removal procedure, *State v. A.M. Segedy*, 20329069-OC, City of Phoenix Court, March 15, 1976.

When asked:

> "Q: and don't you think a person who appears before that kind of a Board situation can say many things since he knows they're not being taken and therefore, it would never be divulged to anybody. Maybe they could misinterpret or exaggerate or maybe give untruths, isn't that right?"

The then Chief City Court Judge's response was:

"A: It's possible, sure."

The above recited evidence was before the Arizona and Federal Courts when they dismissed Petitioner's claims and request for injunctive relief. In *Chambers v. Central Committee*, 224 P.2d 583, the California Court held:

> "a judge is not answerable to the Bar Association, only the law and that to safeguard the independence of the judiciary, it is necessary to show misconduct on the part of the judge before subjecting him to any form of discipline."

Is the same test not applicable when the judicial hierarchy conducts the inquiry. Canon One of the Judicial Code of Conduct, Rule 45 Arizona Supreme Court provides:

> "CANON ONE
>
> "A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing and should himself observe high standards of conduct so that the integrity and independence of the judicary may be preserved. The provisions of this code should be construed and applied to further that objective."

Webster's New World Dictionary defines:

> *Independence.* A being independent; freedom from control of another.
>
> *Integrity*. 1.A being complete; wholeness. 2. Unimpaired condition; soundness. 3. Uprightness, honesty and sincerity.

As a member of a separate and independent branch of government and the judiciary, Petitioner attempted to comply with the mandate of Canon One as amplified by Canons of Judicial Ethics, Raymond L. Wise, 2d ed. Mathew Bender 1970 pertaining to one aware of the need to raise the local

standards. Petitioner laid claim only to being hard-working and honest, serving the law as it related to the needs of the public, and to raise the image of a legal profession which garnered little respect. Samples of that effort can be found in Appendices "E" & "F", and demonstrates efforts to be in a position to fulfill his oath of office. He devoted to that task as much time as required, tormented by some, appreciated by others, even Respondent Chief Justice Cameron wrote twice regarding the Supreme Court's appreciation of Petitioner's efforts.

Unlike some of the Respondents who strive to be identified as "conservative," Petitioner, as mandated by the Code and City Charter, avoided politics, as well as any interest in prosecution for corruption in the justice system. His goal was to establish a fair court system with checks and balances to enable the judiciary to perform its function.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

By Richard T. Tracy, Sr.
Petitioner Pro Se

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD T. TRACY, Sr., Plaintiff- Appellant, v. RODGER A. GOLSTON, et al., Defendants-Appellees.	)	No. 77-2034 MEMORANDUM

(FILED: June 15, 1979)

Appeal from the United States District Court
for the District of Arizona

Before: ELY and KENNEDY, Circuit Judges, and ORRICK,* District Judge.

The trial court was correct in dismissing those portions of the complaint alleging that the appellant had been deprived of a property interest. Decisions by the Arizona trial and Supreme courts, see Tracy v. Dixon, 119 Ariz. 165, 579 P.2d 1388 (1978), confirm that appellant had no entitlement, and on that question we are controlled by the law of the state. Bishop v. Wood, 426 U.S. 341 (1976). Even absent such a definitive decision, it is unlikely that the plaintiff would have been able to show a property interest or entitlement sufficient for stating a constitutional claim under Board of Regents v. Roth, 408 U.S. 564 (1972), and Perry v. Sinderman, 408 U.S. 593 (1972). Similarly, plaintiff's other contentions, both state and

*Honorable William H. Orrick, Jr., United States District Judge for the Northern District of California, sitting by designation.

federal, are without merit.

The trial court retained jurisdiction of the claim by which plaintiff alleged deprivation of a liberty interest by reason of defendants' disclosures to the press, and that issue is not before us. The district court's decision on the motion for partial summary judgment is AFFIRMED.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

RICHARD T. TRACY, SR., Plaintiff, vs. RODGER A. GOLSTON, et al., Defendants.	NO. CIV 77-121 PHX WEC

PARTIAL TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing on Thursday, April 7, 1977, at 3:55 P.M., at Phoenix, Arizona,

BEFORE:

HONORABLE MARTIN PENCE, Judge.

APPEARANCES:

RICHARD T. TRACY, SR., Esq.
7437 North 7th Street
Phoenix, Arizona — Appearing as Plaintiff Pro Se;

EDWARD JACOBSON, Esq.
Snell & Wilmer
3100 Valley Center
Phoenix, Arizona — Appearing for the Defendants.

THE COURT: All right, thank you.

First, addressing myself to the last problem, namely, the motion for partial summary judgment, Mr. Tracy, that must be denied and is denied. For the Court at this time to order what you asked the Court to do, would be for the Court to decide now upon virtually all of the allegations of your complaint and determine that you were 100% right, and that you were entitled to have the immediate action on the part of the Court which you urge; and, that the Court does not feel it can or will do, or is permitted to do by the law, not upon the status of the case as it is presently before the Court. So, your motion for partial summary judgment is denied.

Now, back to the motion to dismiss, which is the underlying motion here, it clearly appears from the pleadings and from the moving papers, that practically every one of the issues before this Court here have been presented to the state court. I say, practically every one. It would appear that even though you, Mr. Tracy, have the actions asking for almost the same relief over in the state court as you have asked here, nevertheless the one that has bothered me all the way through, as Mr. Jacobson recognizes, is that which concerns your rights under § 1983, and no other; as set forth there in both Roth and Perry versus Sinderman, namely, the allegations that there was an act of a state agency in declining to rehire you and, in connection therewith, making statements as to that basis for the rehiring, was certain acts on your part which would cast a stigma upon your reputation as a Judge, which was the position which you held, and might at the same time interfere thereby with your opportunity to be employed. Now, that last portion of it is a little bit weak,

because employment as a judge, and there are very few jobs that call for judges, and once you have been removed as a judge, ordinarily only a change in politics enables you to get back again. But, there have been changes in the political atmosphere, and I use that term "political" broadly, going far beyond party allegiance. There have been changes in the makeup of various boards and commissions. It might be that subsequent applications before subsequent boards or councils might lead to a different conclusion. That is purely hypothetical.

I am going to dismiss all of your claims except that one, and retain that at this time. I feel that you stated a cause of action under § 1983, under that element of the possible state action in creating and developing that which would be a stigma upon your reputation, which would give you a different standing under both the Roth and Sinderman cases.

Now, as I said earlier, and I'll say it again, insofar as your claim regarding damages for alleged defamatory statements, defamation alone, as you know, doesn't establish a cause of action under any of the Sections 1981 through 1985. As you read undoubtedly, Mr. Tracy, in Williams versus Gorton, which you cited, 529 F2d 668, 1976, the case decided by a Judge from Hawaii—not decided, but written by Judge Choy; you cited it, and there it is.

Now, it would appear then, in light of my order, that you only have about three—how many were on that Committee?

MR. TRACY: The Committee contained seven individuals.

THE COURT: All right, whoever they are, those will

be the only seven left in your complaint here. I'll let you go ahead and let you take your depositions, whatever you want to do to find out what transpired, because, as I see it, everything else you can take care over on the state side.

MR. TRACY: If it please the Court, without the § 1986 right, which is individuals who were aware of the commission of a violation of civil rights who do not prevent it... .

THE COURT: No, that's out.

MR. TRACY: Then I really see nothing that I can gain by discovery. I have put everything I have... .

THE COURT: Listen, you can at least go ahead with your action under § 1983 in connection with your claim that you had a stigma cast upon your liberty by virtue of the release of the information by the state itself.

MR. TRACY: With due respect, may I have clarification. Are you saying—that is the very thing I asked for a motion for partial summary judgment upon.

THE COURT: Well, you don't have enough evidence to get a summary judgment on it. All you have is enough evidence to stay in Court.

MR. TRACY: Fine; thank you, sir.

MR. JACOBSON: Your Honor, do I assume correctly that the Court has decided not to abstain until the settlement of the matter before the Court of Appeals?

THE COURT: In effect, I am abstaining from everything except just this one, narrow claim, that's all. I am not abstaining; I am not using the England case. No, I am not abstaining. I am just simply ruling that he has no cause of action. He stated no cause of action to allow him—this is your motion to dismiss—not on the basis of

everything that's over in the state, not on the basis of abstention; although if you want me to, I'll put that as a double barrel, even if I am wrong on the first dismissal, I will also state that I would abstain from everything else. You can put that in. If I am wrong in dismissing the actions other than just this one, narrow issue—one, narrow facet of the complaint—I would abstain from any of the rest because it appears to me from the pleadings and what has been represented here that all of the actions can be properly, and should properly be heard over on the state side and in the state courts where they now are resting.

Prepare the order.

(Whereupon the proceedings were adjourned at 5:45 P.M., April 7, 1977.)

APPENDIX "C"

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

In Division

RICHARD T. TRACY, SR.,
Judge of the City Court,
Phoenix, Arizona,
Appellant,

v.

WILLIAM P. DIXON,
et al.,
Appellees.

No. 13195

FILED

MAY 23, 1978

Appeal from the Superior Court of Maricopa County
Cause No. 333371
Honorable Lawrence H. Doyle, Jr., Judge

AFFIRMED

STRUCKMEYER, Vice Chief Justice

This is an appeal from the judgment dismissing a specail action in the Superior Court of Maricopa County, Arizona. We accepted jurisdiction pursuant to Rule 47 (e), Rules of the Supreme Court. Affirmed.

On February 14, 1972, the appellant, Richard T. Tracy, Sr., was appointed to a four-year term as a Judge of the City Court of the City of Phoenix. On February 14, 1976, his term of office expired by the passage of time. Appellant brought suit in the Superior Court of Maricopa

County, alleging appellees William P. Dixon and Richard A. Garcia on April 6, 1976, under color of void and illegal appointments, unlawfully usurped his office. Appellant assigns numerous reasons why Dixon and Garcia are usurping his office of City Court Judge, but we think the Superior Court did not err, because quo warranto can only be maintained by a private person when he can show that he is entitled to the office. This, appellant cannot do.

By A.R.S. § 12-2042, an action may be brought in the Superior Court by the county attorney against any person who usurps, intrudes into or unlawfully holds any public office within his county. By § 12-2043, if the county attorney refuses to bring such an action at the request of any person claiming such office, the person may apply to the Superior Court for leave to bring the action in his own name. The county attorney refused to bring an action to test appellant's right to the office and the Superior Court granted appellant leave to bring the action in his own name. After a hearing, the court ordered the action dismissed.

In State of Arizona ex rel. Sullivan v. Moore, 49 Ariz. 51, 64 P.2d 809 (1937), under a companion statute to § 12-2042 by which the Attorney General may bring an action in the Supreme Court, we said that the purpose of the action by the Attorney General is to protect the public interest by preventing one who is not entitled to an office from exercising it, and not to establish the private right of some citizen who is legally entitled to the office. We also said:

> "It may be commenced by the Attorney General on his own information or upon the verified complaint of any person. And in such an action the judgment to be rendered is that the defendant be excluded from the office, nothing being said about the rights of any claimant thereto. Section 4407 (now A.R.S. § 12-2043), however, contemplates a very different proceeding. It is not based on the protection of a public interest

> primarily, but on private rights, and in such an action there must be some person claiming the office or franchise which is being unlawfully held.* * * The complaint must show the one who is entitled to the office, and the judgment, instead of being one merely excluding the unlawful holder, in addition adjudges who is entitled to the office * * *." Id. at 57, 64 P.2d at 812.

Since appellant's term of four years expired on February 14, 1976, he cannot show that he is entitled to the office.

Appellant incorporated in his complaint in the court below a second and third claim for relief. In these claims, he attacked various aspects of appellees' appointments to the City Court. The rule of law is well established, however, that a claimant to an office may have judgment only on the strength of his own title and not upon any infirmity or weakness in the defendant's title. La Polla v. Board of Chosen Freeholders, 71 N.J. Super. 264, 176 A.2d 821 (1961); Ebright v. Buck, 326 Mich. 208, 40 N.W. 2d 122 (1949); State ex rel. Maffett v. Turnbull, 212 Minn. 382, 3 N.W. 2d 674 (1942); Black v. Cummings, 62 R.I. 361, 5 A.2d 858 (1939); State ex rel. Davis v. Plapp, 61 Ohio App. 76, 22 N.E. 2d 456 (1938); State ex rel. Stain v. Christensen, 84 Utah 185, 35 P.2d 775 (1934).

As an example of the various holdings supporting the foregoing principle, in State ex rel. Maffett v. Turnbull, supra, the court held:

> "Relator cannot help his case by an attack on respondent's title to the office. Relator can maintain the present proceeding only if he is entitled to the office; otherwise the matter is no concern of his, but of the Attorney General as the official to whom the right of instituting quo warranto is confided as the representative of the public." 3 N.W. 2d at 677.

And in State ex rel. Stain v. Christensen, supra, the court said:

> "One who seeks the aid of a court to be inducted into an office must show a present right. If the showing be that one has been entitled to the possession of an office but that such right has ceased to exist, a court may not properly lend its aid to place such a person in office." 35 P.2d at 782.

The judgment of the Superior Court is affirmed.

FRED C. STRUCKMEYER, JR.
Vice Chief Justice

CONCURRING:

WILLIAM A. HOLOHAN , Justice

FRANK X. GORDON, JR., Justice

IN THE SUPERIOR COURT
OF MARICOPA COUNTY, STATE OF ARIZONA

Later . . .

This matter having been under advisement,

The Court determines that the City of Phoenix under its City Charter has a right of home rule.

The Court further determines City of Phoenix in preparation of the Judicial Selection Committee conforms to the State Law and Article 6, paragraph 36 of the Arizona constitution and particularly Section 36E.

The Court futher determines that constitutional by authority, public or executive hearings, has to be determined by the Selection Committee.

The Court further determines that the Selection Committee has perogative of calling what candidates they wish to interview.

The Court further determines that the Selection Committee did hold open meetings to determine proper officers or employees to be hired for a definite period of time.

Court further determines that the City of Phoenix has the absolute power and authority under its charter to hire personnel for a specified period of time and for a specified salary.

Court further determines that at the end term of employment, the City may seek other qualified persons or rehire the person for an additional period as designated by the City of Phoenix and its charter and amendment thereto.

Court further determines that its in the best interest of the City of Phoenix and citizens of the City of Phoenix to set the judicial standards and standards of anyone employed in executive or judicial office.

Court further determines that the Judicial Selection Committee and the City of Phoenix did not commit any capricious, arbitrary or detrimental acts as to the Petitioner.

Court further determines the contract of employment is for a term as specified, that at the end of the term, City of Phoenix or any employee can specify any additional terms of employment and qualifications thereof.

The Court further determines that the removal from office of any judicial officer during his term is based on misfeasance nonfeasance or malfeasance while said individual is in office and does not apply to a re-employment or a new contract.

The Court further determines that if judicial appointments are subject to the will and control of the people of the State of Arizona and they approved the matter of selection; therefore,

The Court concludes that all actions of the City of Phoenix and the Judicial Review Committee were proper and in conformance with all the standards of procedures as required by the statutes of the State of Arizona and the constitution of the State of Arizona.

The Court further concludes that the composition of the Judicial Commission are proper and in conformance with the opinion of Bridegroom v. State Bar filed June 9, 1976 as #2 CA-Civ 2083.

The Court further concludes that the City of Phoenix under the period of the last seven years has sought a method to set up a procedure for appointment of Judges which would not be subject to the criticism as to seperation of powers of the executive, legislature and judicial branch.

IT IS ORDERED dismissing the complaint with costs to the Defendants. The Court further concludes that Ralph Smith is not a proper party having been appointed to another Judges position who had resigned.

IT IS FURTHER ORDERED that counsel for the Defendants shall prepare Findings of Fact and Conclusions of Law in accordance and pursuant with Rule 52 LRCP and Rule 8(c) LRP, and a formal Judgment pursuant to Rule 58 ARCP for presentation to the Court.

IT IS FURTHER ORDERED admitting Exhibits #1 through Exhibit #14 in evidence for the purpose of determining the issue on the Motion to Dismiss.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD T. TRACY, Sr., Plaintiff-Appellant, v. RODGER A. GOLSTON, et al., Defendants-Appellees.	)	No. 77-2034 ORDER

(FILED: September 12, 1979)

Before: ELY and KENNEDY, Circuit Judges, and ORRICK,* District Judge.

The panel as constituted in the above cases has voted to deny the petition for rehearing. Judges Ely and Kennedy have voted to reject the suggestion for a rehearing en banc, and Judge Orrick has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*Honorable William H. Orrick, Jr., United States District Judge for the Northern District of California, sitting by designation.

APPENDIX "E"

(Letterhead of Judge Richard T. Tracy)

September 27, 1973

Honorable R. C. Coulter, Jr.
Superior Court Division 24
125 West Washington Street
Phoenix, Arizona 85003

Re: Kilstrom v. Tracy
C 282326

Dear Judge Coulter:

Allow me to thank you for your patience at the hearing on the above caption matter on September 25th. You are correct, I cannot adjust to the system that currently exists and therefore, work hard to try and change the system. I deplore the fact that thousands of cases are plea bargained or dismissed without regard to the merits. That several lawyers have a ninety percent dismissal rate and never try a case. Such practice (sic) is not fair to other defendants or lawyers who do not manipulate the system. Over thirty-five percent of D.W.I. cases are reduced or acquited in the Phoenix City Court, of those appealed, an additional fifty-five percent are dismissed.

I have proposed legislation that would eliminate a de novo trial when a trial in the lower court was waived and permit an appeal on questions of law to the Superior Court or Court of Appeals by both the defense and the State. Remands for trial and motions for a new trial are unheard of in Maricopa County, dismissal and plea bargains on appeal are common. Once defense attorneys find that cases will be disposed of on the merits, the number of trial setting in our Court will decrease, the appeal will become rare. In other Jurisdictions, appeals on questions of law far out number trial de novo.

In recent months, we have made great strides in bringing our case load current, affording all a fair trial and the Guilty an opportunity for rehabilitation. I am proud of my role and that is why I was so disturbed by the untrue allegations of the petition. Had the objection been made at the time of trial, rest assured that I would have considered another course of action.

I appreciate the fact that an ex parte restraining order was not granted by you in this case. It is the first time, to my knowledge, that a hearing was required. Such action, I am certain, would reduce the special actions filed, as well as increase the time before trial that an attorney would review his defense in a given case.

Sincerely yours,
/s/ Richard T. Tracy
Richard T. Tracy

RTT/hc

APPENDIX "F"

Arizona Republic
1974

Progress mâde in lower court revision drive

The Republic's report on the open meeting of the Advisory Committee on Lower Court Reorganization was somewhat disappointing to this reader. The negative reasons for reorganization were stressed, the positive aspects underplayed. I believe it was a healthy and productive discussion on a subject which has been under consideration since 1960 when the voters approved the Modern Courts Amendment to the State Constitution.

Nationally the court systems are being re-examined. The crime rate has steadily increased in spite of tripling law enforcement budgets over the past 10 years. This year over $10 billion will be spent on state and local law enforcement. The direct and indirect loss to the public from crime is impossible to ascertain. It serves no purpose to increase the size of the funnel (law enforcement) or the container (correction and reform) without at least examining the filter and opening of the container to look for obstructions.

The court budget for the entire state is about half that of the City of Phoenix for law enforcement. It is false economy to deprive the courts of the tools necessary to effectively perform their function.

At the meeting several obstructions were called to the committee's attention from both rural and urban areas: Plea-bargaining on a de novo appeal; the city being required to prosecute while the county retains the revenue; lack of communication between the various courts on issues seldom. . . . . .

NO. 79-879

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1979

RICHARD T. TRACY, SR., PETITIONER
v.
RODGER A. GOLSTON, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

EDWARD JACOBSON
3100 Valley Center
Phoenix, Arizona 85073
Attorneys for Respondents

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents in this action respectfully request this Court deny the Petition for Writ of

Certiorari, seeking review of the decision of the United States Court of Appeals for the Ninth Circuit. A copy of the unpublished Memorandum Decision of the court of appeals is attached as Appendix A.

OPINIONS BELOW

The Petitioner herein, Mr. Richard T. Tracy, filed a state action in the Superior Court for Maricopa County, State of Arizona and a federal civil rights action in the United States District Court for the District of Arizona, arising out of the same factual background. The federal action forms the basis for Petitioner's Petition for Writ of Certiorari herein. In that action, the court of appeals, by Memorandum Decision, upheld the judgment of the district court dismissing all but one of Petitioner's claims. Preserved for further proceedings in the district court was Petitioner's allegation that statements made by members of the Judicial Selection Advisory Committee imposed upon him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities within the purview of Board of Regents v. Roth, 408 U.S. 564 (1972).

While in his Petition, Petitioner alleges that the district court directed he exhaust his

state administrative remedies before the federal court would consider his claims, the record fails to support that allegation. Nowhere in either the district court's oral pronouncement of judgment or in its formal written judgment was Petitioner required to exhaust any state administrative or judicial remedies.

Prior to the circuit court setting this case for oral argument, Petitioner petitioned this Court for a Writ of Certiorari Before Judgment. That Petition, No. 77-348, which contained many of the same arguments that are urged in the present Petition, was denied. 434 U.S. 912 (1977).

Even though the state cause of action is not before this Court on this Petition, Petitioner has based several of his arguments on that case. A final decision was rendered in the state action by the Arizona Supreme Court in Tracy v. Dixon, 119 Ariz. 165, 579 P.2d 1388 (1978). That decision held that Petitioner could show no entitlement to a position as city court judge under applicable state law. Petitioner also filed a Petition for Writ of Certiorari in the state action which Petition again was denied by this Court. 439 U.S. 983 (1978).

QUESTIONS PRESENTED

Petitioner's presentation of the issues posed by this case is somewhat difficult to follow. However, the issues stated before the Court of Appeals for the Ninth Circuit were as follows:

1. Was the district court correct in determining that Petitioner had neither actual nor de facto tenure and, therefore, had no property interest in reappointment to the position of Judge of the Phoenix City Court?

2. Was the district court correct in determining that Petitioner did not have a 42 U.S.C. §1983 action in the nature of defamation by reason of allegations of injury to reputation alone?

3. Was the district court correct in dismissing Petitioner's claim that the decision not to reappoint him was in retaliation for his exercise of First Amendment rights?

4. Was the district court correct in denying Petitioner's Motion for Partial Summary Judgment?

STATEMENT OF THE CASE AND FACTS

The events that lead to Petitioner filing state and federal actions are somewhat difficult to

determine from Petitioner's Brief and, thus, are hereinafter summarized.

Petitioner was appointed to the position of Phoenix City Judge by the Phoenix City Council to serve a single four-year term beginning on February 15, 1972 and expiring in February of 1976. This appointment was made pursuant to Chapter 8, Section 3(a) of the Phoenix City Charter.

Prior to the expiration of Petitioner's term, the City Council created the Judicial Selection Advisory Board, hereinafter referred to as the Advisory Board. The purpose of the Advisory Board was to recommend to the City Council the most highly qualified candidates for appointment to the city court bench. Public hearings were held by the Advisory Board to consider the potential appointees, including Petitioner.

The Advisory Board determined that it would not recommend Petitioner for a new or second four-year term. The City Council (in a public meeting where both Petitioner and his attorney were in attendance and allowed to make a presentation) decided to follow the Advisory Board's recommendation and did not reappoint Petitioner to a new four-year term.

Petitioner in his Petition asserts that he had tenure in his position as a City Judge and,

thus, was entitled to a due process hearing. Presumably, Petitioner must be alleging implied or de facto tenure, for the record is without support for anything other than an office with a fixed four-year term. Thus, no possible construction could support a claim of actual tenure. In any event, the Arizona Supreme Court, in Tracy v. Dixon, 119 Ariz. 165, 579 P.2d 1388, cert. denied, 439 U.S. 983 (1978), held that Petitioner had no tenure, actual or implied, or any other entitlement to the office.

Before the Arizona Supreme Court rendered its decision in Tracy v. Dixon, supra, Petitioner filed suit pursuant to 42 U.S.C. §1983 against all but one member of the Phoenix City Council, all members of the Advisory Board and the Phoenix City Manager. Among other things, the Complaint requested a due process hearing, reinstatement to the office of City Court Judge, and monetary damages. Respondents moved to dismiss the Complaint.

In response to the Respondents' Motion to Dismiss, Petitioner filed a Challenge to the Array of Jurists on the ground that none of the district court judges could hear the case fairly for the reason that they were all members of the State Bar of Arizona and several of the named defendants were prominent local judges, including

the Chief Justice of the Arizona Supreme Court. Thereafter, Judge Walter Craig assigned the Motion to Dismiss to the Honorable Martin Pence, Senior United States District Court Judge from Hawaii, who was not a member of the State Bar of Arizona.

Petitioner also filed a Motion for Partial Summary Judgment. Both motions were consolidated for oral argument before Judge Pence.

After hearing oral argument on the motions, Judge Pence denied Petitioner's Motion for Partial Summary Judgment in its entirety and granted the Respondents' Motion to Dismiss except for that portion of Petitioner's Complaint which could be taken to state a liberty interest claim within the purview of Board of Regents v. Roth, 408 U.S. 564 (1972). The liberty interest claim portion of Petitioner's Complaint is still awaiting action in the district court.

Petitioner appealed from this judgment to the Court of Appeals for the Ninth Circuit which affirmed the district court. The court of appeals, relying on Bishop v. Wood, 426 U.S. 341 (1976); Board of Regents v. Roth, supra; and Perry v. Sindermann, 408 U.S. 593 (1972) rendered its affirmation by Memorandum Decision. It is that decision that Petitioner seeks to have the United States Supreme Court review.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Petitioner has failed to present with accuracy, brevity and clarity the reasons why Certiorari should be granted.

A review of the Petition for Writ of Certiorari fails briefly and clearly to present reasons why this Court should grant a Writ of Certiorari.

United States Supreme Court Rule 23(4) provides:

> The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

The letter and spirit of this rule might well be applied herein.

2. Petitioner has not demonstrated reasons, of the character required by Rule 19, why a Writ of Certiorari should be granted.

United States Supreme Court Rule 19 sets forth a series of considerations which indicate the type of cases that are of sufficient moment for this Court to accept for review by way of a

Writ of Certiorari. Petitioner has failed to demonstrate that any of these "special and important reasons" apply in his case.

To begin with, Petitioner has not shown that the Memorandum Decision of the Court of Appeals for the Ninth Circuit is in conflict with any of its other decisions or the decisions of any other circuit. Nor has Petitioner demonstrated that the circuit court's decision is in conflict with any applicable decisions of the United States Supreme Court. Instead, the court of appeals decision follows precisely and is controlled by this Court's opinions in Board of Regents v. Roth, supra; and Perry v. Sindermann, supra. Again, Petitioner cannot demonstrate that the court of appeals opinion decided any important question of federal law that previously had not been settled by this Court.

The essence of Petitioner's case is that 42 U.S.C. §1983 was violated when the Advisory Board failed to recommend him for reappointment after expiration of his fixed four-year term as City Judge, and the City Council followed that recommendation by not reappointing him. This, Petitioner alleges, deprived him of a property interest protected by the Fourteenth Amendment to the United States Constitution. Civil rights cases involving alleged property interests are

neither new nor unusual. The legal standards to be applied in such cases have been established firmly by this Court for some time and were correctly applied in reaching the decision on Petitioner's case.

The court of appeals saw nothing important or unique about this case. Instead of issuing a published opinion on the matter, it filed a Memorandum Decision. Under Rule 21(b), Rules of the United States Court of Appeals for the Ninth Circuit, a memorandum decision is appropriate only when the case presents no legal issues of unique interest or substantial public importance and does not establish, modify, clarify or criticize an existing rule of law. It is submitted that the court of appeals correctly viewed Petitioner's appeal as one appropriate for a memorandum decision.

In his Petition, Petitioner has made a general and unsupported claim that the court of appeals and the district court have departed so far from the accepted and normal course of judicial proceedings that this Court is required to exercise its power of supervision. However, nothing in the record would reflect any departure from normal judicial proceedings.

At several points in the Petition, Petitioner alleges impropriety in the state court

proceedings. However, the actions of the state court are not before this Court in this Petition. The Petition for Writ of Certiorari is directed only to the decision of the Court of Appeals for the Ninth Circuit, not to the state courts. Petitioner previously had petitioned for a Writ of Certiorari from the state court decision, and that Petition was denied. 439 U.S. 983 (1978).

3. The court below fully considered and correctly decided the issues.

The basic reason Petitioner sets forth to support the granting of his Petition for a Writ of Certiorari is that the courts below, both state and federal, improperly have decided the merits of his case. However, a summary of the issues below and their resolution demonstrates that Petitioner's case was considered fully and decided correctly.

Petitioner's claim that forms the basis for his entire case was that, somehow, he was entitled to reappointment to a second four-year term as City Court Judge. Yet all of the courts that have passed upon the merits of Petitioner's case agree that the office of City Court Judge carried only a fixed four-year term and, therefore, Petitioner had no property interest in the office at the end of that term. Thus, under

Board of Regents v. Roth, supra, Petitioner failed to show that the fixed four-year position carried with it actual tenure beyond that term. And, Petitioner, similarly, was unable to demonstrate that it carried with it implied or de facto tenure as defined in Perry v. Sindermann, supra. As a result, no due process hearing was necessary as a predicate to failing to appoint him to a new four-year term.

Petitioner's inability to prove any entitlement to the second term under the applicable standards established by this Court is the key to his failure to have prevailed on the merits. It is submitted that all of the courts that have examined the merits applied the Supreme Court precedents correctly in reaching the decision that Petitioner had no tenure.

The second issue presented to the court of appeals is controlled by Paul v. Davis, 424 U.S. 693, reh. denied, 425 U.S. 985 (1976). Petitioner claimed that he had an action in the nature of defamation under 42 U.S.C. §1983 due to alleged defamation alone. Under Paul v. Davis, defamation under color of state law by itself is not enough to state a cause of action under 42 U.S.C. §1983. Before such an action will be recognized, there must be, in addition, a governmental action of a kind which would alter

or extinguish a right previously afforded by state law. However, Petitioner was not deprived of any state protected right. His fixed four-year term simply expired and he was not reappointed.

Petitioner's claim that the decision not to reappoint him was in retaliation for the exercise of his First Amendment rights is a conclusory allegation unsupported by fact. There was no link between any exercise of Petitioner's First Amendment rights and the actions of the Advisory Board or the City Council, nor has Petitioner been able to find one. The dismissal of this conclusory allegation was proper under United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 860 n.27 (1975) and Sherman v. Yakahi, 549 F.2d 1287 (9th Cir. 1977).

Based on the discussion above, it is submitted that both the district court's denial of Petitioner's Motion for Partial Summary Judgment and the affirmance thereof by the Court of Appeals for the Ninth Circuit were proper.

Other arguments Petitioner raises are inapplicable to the case at bar. For example, at page 23 of his Petition, Petitioner properly cites In Re Laughlin, 153 Texas 183, 265 S.W.2d 805 (1954), for the proposition that the appropriate standard of proof for removing a judge from office is clear and convincing evidence. Peti-

tioner, however, fails to recognize that Judge Laughlin was being removed from office prior to the end of his elective term while Petitioner was not removed from office at all. Instead, Petitioner's fixed four-year term expired and he simply was not reappointed. The two fact situations are so dissimilar that the rule of In Re Laughlin, supra, is not in point.

In summary, Petitioner has failed to demonstrate why a Writ of Certiorari should be granted to allow review of this case. Not one of the considerations outlined in Rule 19 is present. Neither can Petitioner show that his case was not fully considered and correctly decided on the merits.

Review by Writ of Certiorari is not a matter of right but of sound judicial discretion. Nothing present in this case would call for this Court to exercise that discretion.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,
EDWARD JACOBSON

By EDWARD JACOBSON
Edward Jacobson

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD T. TRACY, Sr., Plaintiff-Appellant, v. RODGER A. GOLSTON, et al., Defendants-Appellees.	)	No. 77-2034 MEMORANDUM

Appeal from the United States District Court for the District of Arizona

Before: ELY and KENNEDY, Curcuit Judges, and ORRICK,* District Judge.

The trial court was correct in dismissing those portions of the complaint alleging that the appellant had been deprived of a property interest. Decisions by the Arizona trial and Supreme courts, see Tracy v. Dixon, 119 Ariz. 165, 579 P.2d 1388 (1978), confirm that appellant had no entitlement, and on that question we are controlled by the law of the state. Bishop v. Wood, 426 U.S. 341 (1976). Even absent such a definitive decision, it is unlikely that the plaintiff would have been able to show a property interest or entitlement sufficient for stating a constitutional claim under Board of Regents v. Roth, 408

U.S. 564 (1972), and Perry v. Sindermann, 408 U.S. 593 (1972). Similarly, plaintiff's other contentions, both state and federal, are without merit.

The trial court retained jurisdiction of the claim by which plaintiff alleged deprivation of a liberty interest by reason of defendants' disclosures to the press, and that issue is not before us. The district court's decision on the matter for partial summary judgment is AFFIRMED.

*Honorable William H. Orrick, Jr., United States District Judge for the Northern District of California, sitting by designation.

In the

Supreme Court of the United States

October Term, 1979

NO. 79-879

IN THE MATTER OF
RICHARD T. TRACY, SR.,

Petitioner,

AGAINST

RODGER A. GOLSTON, JOHN WENTZ, ANTHONY H. MASON, ROBERT C. BROOMFIELD, STANFORD LERCH, JAMES CAMERON, JAMES O. WHITE, CHARLES LEE WHITECRAFT, ROBERT J. DONOHOE, MARGARET P. HANCE, WILLIAM DONAHUE, JOY W. CARTER, ROSENDO GUTIERREZ, KENNETH O'DELL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

RICHARD T. TRACY, SR.
2650 West Union Hills Drive
Phoenix, Arizona 85027
Petitioner Pro Se
Attorney for Petitioner

In the

Supreme Court of the United States

October Term, 1979

NO. 79-879

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ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
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In the

Supreme Court of the United States

October Term, 1979

NO. 79-879

IN THE MATTER OF
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Petitioner,

AGAINST

RODGER A. GOLSTON, JOHN WENTZ, ANTHONY H. MASON, ROBERT C. BROOMFIELD, STANFORD LERCH, JAMES CAMERON, JAMES O. WHITE, CHARLES LEE WHITECRAFT, ROBERT J. DONOHOE, MARGARET P. HANCE, WILLIAM DONAHUE, JOY W. CARTER, ROSENDO GUTIERREZ, KENNETH O'DELL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

Respondent's Brief in Opposition follows their heretofore successful pattern. Like all other tribunals, this Court is to dismiss the Petition without examining the merits of prior proceedings. In four years of litigation, Respondents have not been required to call a witness or file an affidavit.

This Court is asked to assume that all proceedings below were regular and issues correctly decided. If this were true, why do Respondents resist review and examination of the

record? Basic rules of law have been avoided and an attitude adopted by the judiciary that once Petitioner's fixed term of office expired, he has no rights as incumbent or citizen to question or object to the methods, procedures employed or motives of public officials who prevented him from succeeding in his office as Phoenix City Court Judge.

No court, state or federal has permitted an opportunity for debate of Respondents' all important issue of tenure. The Arizona Supreme Court's opinion was based on a denial of standing to bring a Quo Warranto Action and cites 1937 case law. Subsequent liberal court interpretations such as *Application of Levine*, 97 Ariz. 88, 397 P.2d 205, and constitutional safeguards and restrictions were ignored as were provisions of A.R.S. 17 Special Actions Rule 4 and 6 (1970) 38-431.03.1 to .07 (1974), which give Petitioner standing to void the prior proceedings. Confident of continued success, Respondents avoided replying to those issues.

There is no viable case pending in Federal District Court in view of the holdings of *Monroe v. Pape*, 365 U.S. 167; *United States v. Wickersham*, 201 U.S. 390; *Silver v. New York Stock Exchange*, 373 U.S. 341, and *Regents v. Roth*, 408 U.S. 564.

THE U.S. COURT OF APPEALS FOR THE 9TH CIRCUIT DID NOT APPLY THE USUAL STANDARD OF REVIEW

In adopting the Arizona Supreme Court's holding in *Tracy v. Dixon*, 119 Ariz. 165, 579 P.2d 1388, the inadequate and futile, dismissed state administrative review which the Senior District Court Judge required the Petitioner to pursue when dismissing federal civil rights claims of the Petitioner, the Court of Appeals said:

> "Even absent such a definitive decision, it is *unlikely* that the plaintiff would have been able to show a property interest or entitlement sufficient for stating a constitutional claim." (Emphasis added.)

The action should not have been dismissed or the dismissal affirmed if that or any other material allegations of the complaint were not shown beyond a doubt to be contrary to Petitioner's material allegations, which, on motion to dismiss, are taken as admitted and to be liberally construed in favor of the Petitioner. Those standards are summarized by the 9th Circuit in *Sherman v. Yakahi*, 549 P.2d 1287 (1977), at page 1290. In that case, the failure to follow rules in the discharge process, as in the case at hand, was found to be a violation of the civil rights statute. "Procedure is to law what 'scientific method' is to science." *In re Gault*, 387 U.S. 1.

The U.S. Court of Appeals for the 9th Circuit did not address the first amendment issue as they did in *Haimowitz v. University of Nevada*, 579 F.2d 526 (1978), where it held:

> "Despite the fact that appellant had no tenure, he still cannot be removed if his dismissal is predicated on his exercise of first amendment rights, (citations)"
>
> * * *
>
> "Under this procedure, Appellant should have been given the opportunity to show that his conduct was protected and that protected activity was the motivating factor in his nonretention."

This Court shifted that burden to the agency in *Mt. Healthy v. Doyle*, 429 U.S. 274, decided after the cases cited by Respondents in their brief. Petitioner was not afforded that opportunity. He was precluded from discussing merits or acts of officials, by judges who raised from their seats in anger when he attempted to do so.

In their brief, Respondents set forth the questions believed presented in the lower court in a manner that reduced issues presented and relegated the First Amendment claim to a secondary issue.

The Brief on Appeal read as follows:

> "Is a judicial office holder who offers constructive criticism of the justice system deserving of a fate reserved by the religious for heretics, the military for traitors, without being afforded due process or equal protection of law?
>
> Has a District Court jurisdiction to require Plaintiff-Appellant to exhaust his state administrative remedies and dismiss with prejudice his federal claims, thus denying a trial or hearing at any level on any claim?
>
> Upon the record, was the District Court required to deny Appellee-Defendants' Motion to Dismiss and grant Appellant's Motion for Partial Summary Judgment in view of the allegation supported by evidence of non-retention in retaliation for exercise of First Amendment rights accompanied by lack of due process and equal protection when the opposing party relied upon argument, not evidence to resist the motion?"

First Amendment rights and absolute dominance over the legal system of this isolated community has always been the underlying issue, not tenure. Why else would such an august body assemble to review a city court Judge's reappointment and why hold a hearing nine days after his term expired if he did not have tenure?

No court has given consideration to the serious loss of liberty when an attorney is secretly and publicly defamed in the presence of or by the Chief Justice of the local Supreme Court and Chief Trial Court Judge. Abuse of power over those in the legal system occurs frequently as demonstrated by the attached Appendix "G". What is rare is that

one would attempt to question their authority. Once the scheme unfolded, no alternative was available. Petitioner had lost reputation, liberty, property and the feeling of security. Even moving to another jurisdiction did not permit escape from the stigma of the removal process.

Respondents' inference that Petitioner was given a due process hearing is not supported by the facts. After the improper secret and public meetings, at which evidence allegedly was received against Petitioner and his successor interviewed, Petitioner made written demand for an open hearing. It was then that the Board intimidated the City Council to ratify their action and replace Petitioner. The newspaper carried his removal and named his successor, as well as vicious false charges released by the Board Chairman. Petitioner learned of that meeting from the evening T.V. news on March 2, 1976. On March 9, 1976, he appeared before City Council and requested a due process open hearing provided for by local law and prior pronouncements of State and Federal Courts. (Appendix "G") He continued to be the lawful incumbent until forced to vacate the office on April 5, 1976.

RULE 19 IS CALLED FOR TO PRESERVE THE "IMPERATIVE OF JUDICIAL INTEGRITY."

At the dawn of true democracy in this nation in *Mapp v. Ohio*, 367 U.S. 643, this Court observed:

> "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As M. Justice Brandeis, dissenting, said in *Olmstead v. United States*, 277 U.S. 438, 485 (1928): 'Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . If the Government becomes a lawbreaker, it

breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy'."

When the offenders are those who impose on other professions standards which they themselves fail to observe and disregard duly enacted legislation, then that danger is a clear and present one.

Due to lack of respect for the law and wide spread corruption present in Arizona in 1973, the Petitioner had imprinted upon his personal stationery the following which may have served as his epitaph:

"A NATION CAN NOT OUTLIVE JUSTICE,
WHERE LAW ENDS, TYRANNY BEGINS."

CONCLUSION

In the interest of Justice, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD T. TRACY, SR.

The Phoenix Gazette

Thursday, March 4, 1976 Section B, Pages 1 to 12

DEMANDS TO FACE ACCUSERS

APPENDIX G Page 1

Judge Challenges Advisory Board Act

3-4-76

By JOHN H. VESEY

City Court Judge Richard T. Tracy Sr. has charged his constututional rights were violated when a city advisory board recommended the Phoenix City Council not reappoint him to a four-year term.

Tracy's attorney, Richard E. Fay, will ask the council Tuesday morning to conduct a formal open hearing so the judge can meet his accusers face-to-face.

TRACY

Fay contends the council's Judicial Selection Advisory Committee heard damaging testimony during private meetings against the 50-year-old judge and Tracy had no chance to defend himself.

"IF HE DOESN'T get a chance to respond to the charges, I won't consider the matter resolved and we'd have no recourse other than to go to court on it," Fay said.

The Judicial Selection Committee, established by the past City Council last fall, has so far reviewed six of the 13 full-time city judges and has recommended that three of them not be reappointed.

They are: Tracy, Bruce Bayer and James M. Smith. The terms of Tracy and Bayer expired Feb. 15 and Smith was terminated last Dec. 20.

Tracy is the only one to fight the committee's decisions. Bayer reportedly will get job as an assistant in the attorney general's office and Smith will become an assistant in the city attorney's office.

THOSE GRANTED another four-year term: Lyle R. Allen, Harold L. Kantz and Eugene K. Marqum. Allen's appointment came this past Tuesday.

The only other city judge whose term expires this year is Gerbert Danz. It comes May 31.

The city went to the committee approach in selecting judges to avoid political-appointment connotations.

Before 1971 all city judges were

3-5-76

Rights Violation Denied

Constitutional rights of City Court Judge Richard T. Tracy Sr. were not violated when an advisory board recommended he not be reappointed, City Atty. Joe R. Purcell declared today.

Tracy, through his attorney Richard E. Fay, will address the Phoenix City Council on the subject at the Tuesday morning council meeting.

Fay said he will ask the council to grant Tracy a formal hearing.

PURCELL said the ruling in the city manager v. court judges

Although Purcell said hearings on appointments weren't necessary, he conceded that it wasn't really fair to lump the city court judges in with board and commission appointees, since they work free and judges make $23,517 annually.

TRACY AND his attorney have threatened to sue the city if he isn't granted a hearing, since neither were given an opportunity to hear allegations made against the judge.

These were made during a Feb. 25 public hearing when citizens claimed he was unfair to

B-16 Wed., Mar. 10.

judges four-year plans to sue t.. failure to give .. open, public hearing.

TRACY, through his attorney, Richard E. Fay, argues his constitutional rights were violated when the council's Judicial Selection Advisory Committee failed to let Tracy speak in his own defense when certain allegations were made about him.

He was accused of being closed-minded to minorities and poor people, attempting to superimpose himself as prosecuting and defense attorney as well as judge and issuing a directed verdict of guilty in a case without letting it go to a jury.

shown for reappointment.

They also told the council if the committee's recommendations weren't upheld — and the council instead made its decision on a political instead of moral basis — the committee's members would resign en masse.

MEMBERS OF THE committee: Robert C. Broomfield, presiding judge of the Superior Court; James Duke Cameron, chief justice of the Arizona Supreme Court; Stanford Lerch, treasurer of the State Bar of Arizona; Anthony H. Mason, president of the

Berger says pressure blocked probes

By ALBERT J. SITTER

Maricopa County Attorney Moise Berger blamed pressure from a "power structure coalition" for the failure of his office to investigate and prosecute white-collar crime, when asked by police for an explanation.

A confidential law-enforcement report includes a transcript of a secretly recorded conversation that took place a year ago between Berger and Lonzo McCracken, a detective with the Phoenix Police Department's intelligence unit.

During that conversation, Berger failed to explain fully why he apparently yielded to the pressures of the "power structure," according to a transcript copy obtained by The Arizona Republic.

prising," McCracken commented in the report.

Berger has announced that he will resign later this month to take a teaching job in California.

Confiding to McCracken about what he described as his years of frustration, Berger related:

"You go on. You can't get the cases filed. You can't get the work done. Now cases get thrown out of court and you don't understand why.

"The reason is very simple," Berger continued. "The goddam lid is on the son of a bitch all the way from the very top."

Land fraud, a common white-collar crime in Arizona which had been given little attention by prosecutors until re-

McCracken. The Republican county attorney apparently ignored the fact that his office had the exclusive power to prosecute felony fraud cases before the creation of a statewide grand jury earlier this year.

Among the influential persons who should be investigated, Berger said in the conversation, is Harry Rosenzweig, a Phoenix jeweler, financier and former state Republican chairman.

Berger said Rosenzweig "should be investigated" for his role in Educational Computer Systems. ECS became the holding company for several fraudulent land firms, including the corrupt Great Southwest Land and Cattle Corp., which was controlled by Ned Warren Sr., a convicted con man and extortionist.

In an interview last year, Rosenzweig blic reporter that he was ckholder and was unaware l Computer's land company

Jumed on Page A-8

11/25/73

City Court Report Held 'Incompetent'

By PRESTON LONG

A report calling for a complete revision of the Phoenix City Court system beled today as "incor and damaging to the c an unfair way."

The change was ma ing interviews with se cial attorneys who had within the court system

"ON THE VERY b is the indication that search by any knowle person was put into lawyer said.

Extensive recommer for updating the court were made yesterday Phoenix City Council page report authored representatives of th tute for Court Manage Denver-based cons

The two-man te ed the city shou outside experi consultant on ar basis" to assist changes in the syst

On a point-by-p practicing lawye

In answer to the recommendation to formulate local rules of court, the attorneys

lready ended re cov- les of ite Su- l down l rules eptem- lorneys nse in rules d by an he high d loud ge that sential- experi-

"That is absolutely wrong. As a point of general law, it is the prosecutor's duty to determine whether to proceed or not with a prosecution," one said.

THEY bargainin the pros fense at only give action.

"Typic room cl swearing study con

State procedur

"In fa nix tried have ha oath and ordered practice,"

1976

Former JP cleared of fund charge

Marion Ralph Jenkins, former Phoenix justice of the peace, was exonerated Wednesday of a charge that he misused public funds while in office and was reinstated as a justice pro tem.

ject.

A charge of misuse of public funds was brought against Jenkins last September when he was running for the Maricopa County Board of Supervisors as an independent.

Jenkins was charged with hav

12-18-74

Jury refuses to indict in courts probe

By JERRY HICKEY

The county grand jury completed its investigation of three cases of alleged record tampering in city courts Tuesday, but it declined to return any indictments.

County Attorney Moise Berger said the jury will continue on Thursday its probe of allegations of misconduct in the city court system.

Reportedly, the three cases already presented to the jury involved two municipal court judges, Daniel Nastro and Herbert Danz.

Nastro, who appeared before the jury Thursday when it started hearing testimony in the probe, also testified Tues-

4-6-76

Phoenix manager fires city attorney; impropriety denied

By RICHARD MORIN

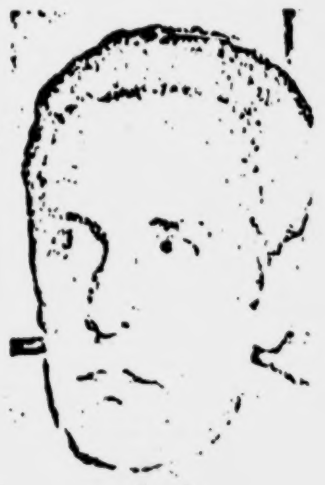
City Attorney Joe Purcell and one of his assistants were fired Monday by City Manager John Wentz.

In an interview Monday afternoon, Purcell said: "I have done nothing wrong. The person who has done

specific comment except to say, "The city manager did what he felt he had to do. It's purely an administrative matter."

Wentz informed the City Council his action at the start of policy meeting in C

I have



Joe Purcell

aid he "had no alternativ the two lawyers."

of something that I coun

City manager to keep getting audit reports

Feb 1976

Mayor Margaret Hance won her first major policy battle Monday as she convinced most of the council that the city auditor should continue reportin to the city manager, rather than to th council.

Her major opposition came from Vic Mayor Rosendo Gutierrez, who argue along with City Attorney Joe Purce that the City Charter stipulates tha the auditor should report directly to t council.

But the fiv other councilmen agree that internal city audit reports were management tool needed by the ma ager.

Mayor Hance argued that her plan revamp the city audit committee wou alleviate the charter issue. The coun agreed to expand the committee include Hance and Councilman Cal Goode.

With two members of the council the committee, Mayor Hance said, t council would be informed of au reports at the same time as t manager.

Purcell argued that the charter do not permit the auditor to report to t manager.

Mayor Hance said she will try resolve the charter problem and repo

INPUT WANTED

The Judicial Selection Advisory Board will hold a public meeting at 3:30 p.m. February 25 in the lower Council Chamber to permit members of the legal profession and general public to voice their views on whether three City Court judges should be reappointed for another four years. reappointment are Judges Lyle and Tracy, and Bruce Bayer. comments on ns will be

Chief city judge says courts are hindered by police probe

By JACK SWANSON

The head of the Phoenix court system termed the investigation of his courts by Phoenix police a "witch hunt," charged it is hindering court work and pleaded that it be ended immediately.

"There's just no other word for it," said chief city court Judge Eugene Mangum Friday. "We've got to put an end to this business. It's upsetting the court and it's just tragic what it's doing."

"Our appeals today are three or four times normal. I don't know just how much more, but it's incredible."

Mangum said publicity about the court investigation has prompted lawyers and

— APPENDIX G PAGE 3 —

defendants to appeal cases to Supe Court.

Asked if he thought they felt t could get a fairer hearing by appeal he said, "Yes, I think that's it."

At the request of the City Cou a special police detail has been inv gating changes in court documents disposition of certain cases heard by courts.

Mangum said he doesn't feel investigation has changed the pos action judges may take on cases b has caused the public to lose confide in the city courts.

"I don't think that they're afrai find people innocent, but you know t the public thinks," Mangum said.

Mangum referred to a story in Th day's Arizona Republic about his per al docket as "that touch

Ariz. Republic

A Touch Of Irony

1-10-80

IN CLEARING former state Appeals Court Judge Gary Nelson of any wrongdoing, the State Bar of Arizona has touched on an irony.

Nelson, who was turned out of office in 1978 by voters, was accused by land swindlers Ned Warren Jr. and Howard Woodall of having accepted bribes to clear up gambling debts which, by his own admission, amounted to $7,000.

This, a Bar report says, "represents ... one of the most bizarre injustices ever foisted upon a member of our profession."

Having found rage for Warren and Woodall for what they did to one of their own, the Bar might properly now find some rage for the system that allowed Warren to hold sway in Arizona for more than a decade, and a system that enabled him to fleece victims in shoddy real estate deals.

Embedded in that system was clever legal advice to establish his corporations, legal advice in writing contracts and legal advice that seemed to keep Warren ahead of the law while he enriched himself.

The irony for the Bar is that had Warren not been such a clever operator, and therefore unable to become a powerful and wealthy fixture in Arizona, he then would have been in no position to accuse then-Judge Nelson of any wrongdoing.

Our recollection is that, during the days when police officials and investigative reporters for *The Arizona Republic* were publicly deploring Warren's fraud, the state Bar never officially uttered a word to protest the swindling, nor to investigate whether lawyers were involved in Warren's schemes, nor to express anger over the plight of his victims.

If there is a lesson to be learned, it is this:

The legal profession cannot remain aloof to corruption infecting a community, then wail when one of its own is touched.

It must join forces with industry, finance and civic groups to to erect barriers to the likes of Warren who have found the going easy for their corrupt and criminal ways.

Otherwise, unchecked and unchallenged entrepreneurs of crime will have other occasions to corrupt, and to sully the career of other members of the legal profession.